No. 10,773

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK LAURENT,	*Appellant,*
VS.	
UNITED STATES OF AMERICA,	*Appellee.*

APPELLANT'S CLOSING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLEE FAILS TO ESTABLISH CONSPIRACY.

Nowhere in the brief of appellee is there substantial argument to support the contention that a conspiracy is established in this case, other than the observation contained in appellee's argument on page 14 of its brief, wherein appellee recalls "that the indictment charged all of the persons named therein with conspiracy * * *". We will not take the time of the court to argue the proposition that the indictment is not evidence in the case.

Much stress is laid upon the testimony of the witness Newford, upon whom the prosecution relied to a great extent, and who obviously would be thoroughly conversant with all of the facts and could undoubtedly establish the existence of a conspiracy, if there had

been one, and the participation therein on the part of appellant, had he been a party thereto. But no testimony was elicited from Newford that in any way touched upon the question of the conspiracy. The nearest approach to the subject was Newford's testimony that the appellant stated to him that he, the appellant, could secure gas coupons from the same source from which he, Newford, secured them, which testimony, if true, does not tend to establish a conspiracy.

Appellant contends that, for the purposes of argument, accepting the prosecution's evidence as true in view of the jury's verdict, nevertheless the most that can be claimed for it is that it discloses that the appellant unlawfully purchased illegal gas ration coupons, or in other words, was guilty of the substantive offense of acquiring such coupons. Consider the evidence in any light desired, there is an absolute failure to sustain the charge of conspiracy to acquire, own and/or distribute such gas coupons on the part of appellant. There is no evidence that appellant knew of any conspiracy or the purposes thereof, or the means of executing such purposes, or the parties thereto. There was no long continued, or any, association between appellant and the other parties; nor is there any evidence that appellant was advised that he was considered to be acting in consonance with anyone else to consummate their purposes. At the most there is evidence, if believed—and it must be remembered that all of this evidence was denied by appellant and his witnesses—of two disconnected purchases of gas ration coupons by appellant, and that is all. There is

no evidence that he distributed such gas coupons to others or sold gasoline on the strength of such coupons to others. In fact, the evidence shows that he did no such thing. There were seven alleged license numbers upon his sheets relating to real cars and persons and the prosecution's evidence shows that all of the owners of such cars, as prosecution witnesses, denied that they had used such coupons or that they had ever dealt with appellant. (Appellee's Brief, pages 10-11.) That disposes of the real car owners and the only real third persons mentioned, and also of the prosecution's contention that appellant had used the coupons to obtain illegally gas for parties known or unknown, or had distributed them to parties known or unknown, because the prosecution admits that the remainder of the coupons referred to are fictitious license numbers. Therefore, the only use appellant made of the coupons, taking the prosecution's evidence at face value, although denied by appellant, was to obtain gasoline for appellant himself, without any agreement or understanding with anyone else that appellant in so doing was carrying out a conspiracy scheme or effectuating the purpose of any other person than himself; or, as appellee says: "The coupons appearing on the bingo sheets had been turned in by appellant to distributors for replenishment of gasoline sold." (Appellee's Brief, pages 9 and 15.) This admission and evidence of the prosecution, if true, sustained only the substantive offense of unlawful purchase by appellant, and not conspiracy to circulate or use for circulation or distribute such coupons or gasoline to parties either known or unknown.

COMPLETE CREDENCE TO APPELLEE'S EVIDENCE FAILS OF PROOF.

If the prosecution's evidence is believed it may be that all the parties are guilty of the substantive offenses mentioned on pages 14 and 15 of appellee's brief, but there is no evidence that appellant was a party to any conspiracy to commit those offenses, or even knew of such combination or conspiracy.

Appellee concedes that there cannot be a conspiracy between a seller and a buyer of contraband goods, but attempts to evade the issue by arguing that, "as established in this case, the contraband was counterfeit 'C-2' gasoline coupons, unlawfully acquired, possessed and distributed by appellant" and further that "Appellant purchased the same for the purpose of continuing to violate the law in *distributing* and in using the same unlawfully in the *sale* and acquisition of the gasoline". (Appellee's Brief, page 16.)

Again appellee says that the defendants were charged, among other things, "with the intent and for the purpose of *enabling other persons* to the Grand Jury unknown to unlawfully obtain a rationed commodity, * * * by the use and transfer of said coupons". Appellee's Brief, page 18.) This statement might be of some effect if the evidence sustained such a charge, but the evidence, if believed, and the admission of appellee, as above set forth, demonstrates that the appellant did not distribute said coupons and did not use them or transfer them so as to permit persons known or unknown to obtain gasoline illegally, but, at most, used them to obtain gasoline for himself, with-

out any agreement or understanding with anyone that he was furthering a scheme to said effect, which eliminates and destroys any contention of conspiracy, and brings one back to the substantive offense of illegally purchasing and using gas coupons for one's own personal use and purposes, if the prosecution's evidence, although denied, is to be believed.

The cases cited by appellee in nowise attempt to overrule or change the holding and decision of the *Falcone* case, 311 U. S. 204, relied upon by appellant.

The *Direct Sales Company* case, 319 U. S. 703, cited on page 18 et seq. of appellee's brief, does not depart from the doctrine that to prove conspiracy there must be proof of knowledge of the conspiracy and cooperation on the part of the person, in order to make him a party thereto, even in cases dealing with restricted use goods. The case merely holds that under the facts proven, both by reason of the defendant having been fully advised by the Government that his purchaser intended to use the narcotics for illegal purposes before the sales had been made, and from the further fact that the quantity of the purchases of the restricted article, such as narcotics, would indicate to a reasonable person that the article was not being used for legal purposes, and in view of the further fact of the *long cooperation between the defendant and the guilty doctor, the other party to the conspiracy,* the court could well raise the inference of a knowledge on the part of the defendant that the goods were to be used for unlawful purposes and that the defendant intended to cooperate therein; but the court did not

hold that the mere use of a restricted article was of and in itself sufficient to prove conspiracy. The doctrine of the *Direct Sales Company* case sufficiently appears in the following excerpts:

The court said at page 709:

> "That decision (Falcone case) comes down merely to this, that one does not become a party to a conspiracy by aiding and abetting it, through sales of supplies or otherwise, unless he knows of the conspiracy; and the inference of such knowledge cannot be drawn merely from the knowledge that the buyer will use the goods illegally."

Again, with relation to participation in conspiracy, the court said at page 713:

> "When the evidence disclosed such a system (selling restricted goods in large quantities), working in *prolonged* cooperation with a physician's unlawful purposes to supply him with his stock in trade for his illicit enterprise, there is no legal obstacle to finding that the supplier not only knows and acquiesces, but joins both mind and hand with him to make its accomplishment possible. The step from knowledge to intent and agreement may be taken. There is more than suspicion, more than knowledge, acquiescence, carelessness, indifference, lack of concern. There is uniform and interested cooperation, stimulation, instigation. And there is also a 'stake in the venture', which, even if it may not be essential, is not irrelevant to the question of conspiracy. Petitioner's stake in him was in making the profits which it knew to come only from its encouragement of Tate's illicit operations."

None of the above factors are present in the case before the court. There is no long association between appellant and any of the other parties mentioned herein. There were no stakes to be gained by appellant's becoming a party to the conspiracy. There is no evidence of knowledge that appellant knew there was any conspiracy among any of the parties, or that he was supposed to be a member of any such conspiracy. Nor is there any evidence as to the objects or purposes of any such conspiracy or that appellant knew of any such, or that appellant was aiding or cooperating therein, and there is no evidence that appellant sold the coupons or any gasoline to third persons by virtue thereof; nor is there any evidence that appellant circulated or distributed such coupons to other persons, as appellee charges in its brief, as above pointed out. The license numbers of the real cars applied to owners who all denied that they had received any such coupons from appellant or had made any such purchases of gasoline from appellant. The other license numbers on appellant's bingo sheets were, as appellee admits, fictitious. The only use appellant made of such coupons, if the Government's evidence is to be believed—and which was denied by appellant—was to permit appellant to supply himself with gasoline. This is according to the Government's own case. So if the Government's evidence is to receive credence, all that appears is that defendant purchased the coupons for his own use; that he did not circulate them or distribute them; that he did use them to supply himself with his own gasoline; that he did not deliver them to other persons, nor did he sell

gasoline to other persons on the strength of such coupons. Therefore, as we have contended, the evidence does not show any conspiracy, but at most, if believed, shows that appellant purchased illegally certain gas coupons, which is not the charge upon which he was prosecuted.

The other case cited by appellee, to-wit: *United States v. Bruno,* 105 Fed. (2d) 921 (Appellee's Brief, pages 20-21), in nowise changes or seeks to change the holding of the *Falcone* case, but holds that, as to the defendant as to whom the judgment was affirmed, there was sufficient evidence of knowledge and cooperation. But even with this conclusion, the court nevertheless further determined that the other defendant had not been proven to be a member of the conspiracy, although he had received money orders aggregating $6800.00 from a number of the Louisiana retailers who were members of the conspiracy, and, although the court believed that the defendant was a criminal and most probably was a member of the conspiracy because, as the court put it, the Government had failed to prove that such money orders represented the proceeds of sales of narcotics, and without this element of proof the Government had not proven participation by this particular defendant in the conspiracy and accordingly reversed the judgment as to him.

The doctrine of the *Falcone* case was recently reaffirmed in August, 1943, with relation to stolen gas coupons. The case held that where a person bought stolen gasoline coupons he could not be held on a conspiracy charge to steal the books and to receive them

with intent to convert them, knowing them to be stolen, where there was no evidence to connect the defendant with the original theft by the two original defendants, or with any of the defendants who had pleaded guilty.

The court said:

> "That might have been true if, when Zuli bought the books, he had been told of the scheme to steal and later to sell them, and had agreed to buy them in order to further the scheme. But that was not the situation; although he knew them to be stolen, he bought them without any purpose of securing to the thieves the fruits of their theft. The venture, so far as he was concerned, began as it ended—with the purchase."
>
> *U. S. v. Zuli,* 137 Fed. (2d) 845, August, 1943.

We respectfully submit that the last cited case is in principle directly in point and conclusively establishes that the evidence in the case at bar is not sufficient to sustain a charge of conspiracy.

CONCLUSION.

We respectfully submit that the evidence is wholly insufficient to support appellant's conviction and that the judgment of conviction should be reversed.

Dated, San Francisco, California,
February 23, 1945.

Respectfully submitted,
WALTER H. DUANE,
Attorney for Appellant.